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IN THE

Supreme Court of the United States

October Term, 1943.

No. 916.

BERKSHIRE KNITTING MILLS,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit and Brief in Support Thereof.

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v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Berkshire Knitting Mills, prays that a writ of certiorari be issued to review a final decree of the United States Circuit Court of Appeals for the Third Circuit, entered on January 27, 1944, (XII, 4866-70)* granting the petition of the respondent, National Labor Relations Board (hereinafter called "Board") for the enforcement of its order, dated January 10, 1943, against petitioner, Berkshire Knitting Mills, and dismissing petitioner's petition to review and to set aside the Board's aforesaid order.

Summary and Statement of Matter Involved.

Charges that petitioner had engaged in and was engaged in unfair labor practices in violation of the Na-

* Unless otherwise indicated, Roman and Arabic numerals in parentheses refer to volume and page, respectively, of the printed record.

tional Labor Relations Act (hereinafter called the "Act") were filed with the Board by the American Federation of Hosiery Workers, Branch 10 (hereinafter called "Branch 10") on January 20, 1937. (I, 1, 3.)

Hearings were held from November 29, 1937, to February 1, 1938, at which the trial examiner failed to accord the petitioner a fair hearing. He relaxed the rules of evidence when counsel for the Board or Branch 10 examined witnesses, permitting Board's witness Saposs to read into the record wholly irrelevant matters (VI, 2530), but applied them strictly during examination by counsel for petitioner, (VI, 2543, 4). See also testimony at V, 2035, 2050 and 2058. He permitted Board's counsel to prompt his witnesses, and when documents were offered into evidence by the Board, he at times admitted them into evidence even without looking at them (II, 683, 4, 5; V, 2175). Counsel for petitioner repeatedly objected to methods used by Branch 10's counsel, who was permitted to cross-examine Board's witnesses on matters in no way related to Branch 10 (IV, 1518, 9) while counsel for the Intervenor was limited to the extent that the proceeding pertained to his association. (II, 608). His unwarranted bias was also reflected in his remarks during the examination of Frank Vecchio, Board's witness, (V, 2066, 7) and in permitting incitive speeches by counsel and the applauding by hand and mouth and the hissing and booing at the hearing (V, 2430, 1; VII, 3459).

The two principal issues at this hearing concerned the formation and administration of an independent union and the cause of the strike of 1936. The Board attempted to prove that the strike was caused and prolonged by isolated instances during a period from 1933 to 1937 and by direct evidence as to its cause, to wit, the strike letters, the testimony of Englehart, Ammarell, Payne, and petitioner's employees as well as its documentary evidence. The petitioner has consistently contended that the isolated instances of alleged unfair labor practices had no bearing on the question of the strike and that the aforesaid "direct evidence"

failed to substantiate any finding that the strike was caused by unfair labor practices and not economic factors.

Although oral argument was held before the Board on March 10, 1938, proposed findings of fact, proposed conclusions of law and proposed orders were not filed until more than a year later, namely, April 28, 1939. (I, 29, 117.)

On November 3, 1939, the Board filed its final decision. (I, 217.) It found (1) that the petitioner had dominated and interfered with and supported an independent union both at its formation and thereafter; (2) that the petitioner, during the period from 1933 to 1937, had restrained and coerced its employees in the exercise of rights guaranteed them under the Act in specific instances (which petitioner has always contended did not warrant the interpretation given by the Board or the order entered); and (3) that a prolonged and bitter strike, commencing in the fall of 1936, was caused by unfair labor practices and not from economic causes, as contended by petitioner. (I, 219-294.)

Based on these findings, the Board ordered (1) the disestablishment of said independent union and (2) the reinstatement, with back pay, of employees who had engaged in the aforesaid strike. (I, 295-299.)

Seven days later, November 10, 1939, petitioner filed in the Court below its petition for review contending, *inter alia,* (1) that it did not have a full, fair and impartial hearing, and (2) that under the evidence adduced, it had not been proved that the strike was caused by any unfair labor practice, but on the contrary, the evidence established that the strike had been called solely for economic reasons. (I, 305-322.)

While the case was awaiting argument before the Court below, the Special Committee of the House of Representatives Investigating Labor Board and Wagner Act (hereinafter also referred to as "Smith Committee") disclosed in its proceedings additional facts with respect to this case which showed that the petitioner did not have a full, fair and impartial hearing. The record of said congressional

investigation, so far as it related to Berkshire Knitting Mills, showed in specific detail that Edwin S. Smith, a member of the Board which entered the aforesaid order, and various subordinates of his, were actively biased and prejudiced in favor of the complaining union and against petitioner,—so much so that he and some of his subordinates made special efforts to see "that a case was made out" against the petitioner. The congressional investigation set forth in detail the aid which Smith and his subordinates furnished to the striking union in the conduct of a nationwide boycott and the exercise of economic pressure, including correspondence between Edwin S. Smith and Louis E. Kirstein, of William Filene & Sons Co., of Boston, Massachusetts (one of petitioner's largest customers) and John W. Edelman, Director of Research, American Federation of Hosiery Workers, as well as documents and data furnished to Louis E. Kirstein concerning petitioner and its current strike. Said congressional investigation further showed that the strike of 1936 was not caused by unfair labor practices, but solely for economic reasons, and that the Board, notwithstanding such evidence in its files, nevertheless withheld that evidence at the hearings in this case. The congressional investigation also showed that the Board and its agents, without notice to petitioner, agreed with the officers of and counsel for the striking union to delay the issuance of a complaint from January 20, 1937, to November 6, 1937; yet, after the filing of charges, the Board failed and neglected to confer with the petitioner in answer to its offer to coöperate. Said congressional investigation further showed that the reviewing attorney, Joseph B. Robinson, considered evidence dehors the record, and that the Secretary of the Board, after the close of the hearing but prior to the decision, discussed the case with counsel for the union as to what circuit should be selected in which to litigate the case. (I, 335-402.) The investigation disclosed other prejudicial acts against petitioner, all of which appear in petitioner's petition for leave to adduce additional evidence (I, 335-402) in which proper references are made to the ver-

batim Transcript of Proceedings before said Smith Committee and to which further reference is hereby made.

On May 9, 1940, the petitioner, having discovered the aforesaid additional evidence, filed its petition for leave to adduce said additional evidence, in which petition it set forth in full the nature and basis of said testimony, as well as the reason it had not been available theretofore. (I, 335-402.) On June 13, 1940, the Court below entered an order continuing the petition without prejudice until the hearing of the case upon the merits. (XII, 4801, 2.)

Thereafter the Court heard argument on April 7, 1941, on the petitioner's petition for review, as well as on its motion to adduce additional evidence, and the Court, on June 19, 1941, without deciding the merits of the case, filed its opinion granting petitioner's petition to adduce additional evidence with respect to the activities of Edwin S. Smith, but denied it with respect to other particulars. (XII, 4794-4800.) Exceptions were filed by petitioner with the Court below objecting to its failure to grant *in toto* petitioner's petition to adduce, which exceptions, among others, are relied on now in support of this petition for writ of certiorari. (XII, 4814-21.)

On July 21, 1941, the Court below in conformity with its opinion *supra* entered an order remanding the case to the Board and directing the Board to receive evidence concerning the activities of Edwin S. Smith. (XII, 4810.) The term of office of Edwin S. Smith as a Board member expired on August 26, 1941, before anything was done in connection with said order. Thereafter the Court below, on application of the Board and over objection of petitioner, entered a resettled order on October 14, 1941, remanding the case to the Board, with instructions to proceed without receiving additional evidence concerning Smith's activities, to withdraw its order dated November 3, 1939, and "to reconsider the case, make appropriate findings of fact, and to enter an appropriate order." (XII, 4813,4.) Exception was filed by petitioner to said resettled order. (XII, 4814-21.)

On October 29, 1941, the Board set aside its decision and order dated November 3, 1939. (XII, 4792, 3.)

The petitioner then filed a motion with the Board to adduce testimony concerning the alleged bias and actions of Edwin S. Smith and his associates, but that motion was also denied. (X, 4130, 1.)

Hearings were held on January 12, 14 and 15 of 1942, for the taking of testimony of Luther D. Adams (the Board having reversed its decision in which it had denied a subpœna duces tecum to said witness at the first hearing) and for the introduction of documentary evidence produced under subpœna, especially the minute book, to show the cause of the strike.

During the hearings, the petitioner, in addition to examining Luther D. Adams and such records as he produced, also offered to prove that, at conferences held between Regional Director Root, Isadore Katz, counsel for Branch 10, President Rieve and John W. Edelman, in the office of the Regional Director in Philadelphia, Pennsylvania, the said persons expressed their opinion that there was no unfair labor practice involved in the strike of October 1, 1936, on which they could base a charge of violation of the Act (X, 4309-18) and that as a result of investigations made by agents of the Board the petitioner had not committed any unfair labor practice and that the Federation had purposely persuaded the Board to delay filing the complaint in this case from the time when the charges were filed by the Federation on January 20, 1937 to November 7, 1937. All of these facts were contained in the certified copy of those portions of the verbatim record of the proceedings of the Special Committee of the House of Representatives Investigating Labor Board and Wagner Act which was attached to petitioner's aforesaid petition for leave to adduce additional evidence, *supra*. Moreover, at the conclusion of the second hearing the trial examiner refused to admit into evidence those separate and designated portions of the verbatim record of the aforesaid congressional inves-

tigation which are specifically set forth in Exhibit 14 offered by petitioner at second hearings (X, 4459, 60, 62, 63, 64; PX2* 14, 4565-76.)

At the hearings the trial examiner also permitted witness Adams to pick out any and all references in the minutes which the witness alone believed related to the strike, and refused petitioner's request that it be permitted to examine them or to have the trial examiner personally examine them. (X, 4171-78.) Moreover, the trial examiner admitted into evidence those portions of so-called minutes which were not signed and which were only copies. (X, 4477-99; X, 4500-23.)

On January 12, 1943, after argument on proposed findings of fact, proposed conclusions of law and proposed order, the Board filed its final decision, which in substance was merely a repetition of its previous decision of November 3, 1939. (XI, 4700-87.)

The decision of January 12, 1943, was appealed by petitioner to the Court below by a petition for review, and the Board then filed its petition for enforcement. (XII, 4821-50.)

In this appeal, the petitioner again contended, *inter alia,* that it had never had a full, fair and impartial hearing; that the strike of 1936 was caused by economic factors and not unfair labor practices; that, even if a back-pay order should be entered, it should not include time lost through the prolonged delays of the Board and the Union.

The Court below, after argument, dismissed the petitioner's petition to review, and on January 27, 1944, entered an enforcement order as requested by the Board, which final decree the petitioner now prays your Honorable Court to review on writ of certiorari. (XII, 4853-70.)

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* Exhibits introduced in evidence at the first hearings in 1937-38 by petitioner are referred to as PX; by the Board as BX; by Intervenor as INX.

Exhibits introduced in evidence at the second hearings in 1942 by the petitioner are referred to as PX 2 and by the Board as BX 2.

Jurisdiction.

The final decree of the United States Circuit Court of Appeals for the Third Circuit was entered January 27, 1944. (XII, 4866-70.)

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, § 1, 43 Stat. 938 (28 U. S. C. A. Section 347 (a)) and Section 10 (e) and (f) of the National Labor Relations Act, July 5, 1935, c. 372, § 10, 49 Stat. 453 (29 U. S. C. A. Section 160 (e) and (f)).

Opinions Below.

The findings of fact, conclusions of law and order of the Board filed on November 3, 1939, are reported in 17 N. L. R. B. 239.

The findings of fact, conclusions of law and order of the Board filed on January 10, 1943, are reported in 46 N. L. R. B. 955.

The opinion of the United States Circuit Court of Appeals for the Third Circuit, written by Circuit Judge Goodrich and concurred in by Circuit Judges Maris and Jones, filed on June 19, 1941, is reported in *Berkshire Knitting Mills v. N. L. R. B.*, 121 F. (2d) 235.

The opinion of the United States Circuit Court of Appeals for the Third Circuit, written by Circuit Judge Goodrich and concurred in by Circuit Judges Jones and McLaughlin, filed December 1, 1943, is reported in *Berkshire Knitting Mills v. N. L. R. B.*, 139 F. (2d) 134.

Questions Presented.

1. Did petitioner have a full, fair, prompt and impartial hearing on its alleged violations of the Act, as is guaranteed to it under the Constitution of the United States?

2. Is not the finding of the Board that the strike of 1936 was caused by unfair labor practices of petitioner and not for the purpose of exerting economic pressure on petitioner

for the adjustment of controversies unrelated to any alleged unfair labor practice unsupported by any substantial evidence?

3. May the Board include in a back-pay order time which has been lost through prolonged delays of the Board and of the striking union?

Reasons for Granting Petition.

The petition should be granted because the Court below, in affirming the decision of the Board and entering its enforcement order, has decided a federal question in a way in conflict with applicable decisions of your Honorable Court.

The petitioner has been denied a full, fair, prompt and impartial hearing as guaranteed to it under the Constitution of the United States. *Morgan v. U. S.*, 304 U. S. 1 (1938); *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U. S. 292 (1937).

The petitioner's constitutional guarantee of a full, fair, prompt and impartial hearing has been violated in this case in the following particulars:

(1) The Board and the Court below refused to permit petitioner to adduce additional testimony developed by the Special Committee of the House of Representatives Investigating Labor Board and Wagner Act, which additional testimony would have shown the extent to which the bias and prejudice of Edwin S. Smith and some of his subordinates was present throughout the entire case from its inception, and would further show that, in the absence of a trial *de novo*, petitioner could never have a full, fair and impartial hearing.

(2) The petitioner has been denied a full, fair and impartial hearing by the action of the Court below in entering its order of October 14, 1941, in that it did not require the taking of testimony by the Board concerning the activity of Board member Edwin S. Smith. The mere fact that Smith's

term of office expired on August 26, 1941, which was after the date of the original order of July 21, 1941, directing the Board to take testimony concerning Smith's activities, but before any testimony was so taken (which failure, however, was not due to any delay of the petitioner or the Board) did not constitute any legal reason for the vacation of said original order and the substitution of a resettled order, which in effect whitewashed the alleged prejudicial activities of Smith and his subordinates because it did not require the taking of said testimony. The testimony relating to Smith's activities should have been taken; it should now be available to determine just what his activities were in this case, and until that testimony is made a part of this record, this petitioner has been deprived of its constitutional right of a fair hearing. By this procedure, the Court below, having found that petitioner did not have a fair hearing if the alleged activities of Smith were substantiated by the evidence to be adduced (XII, 4788-4800), could not correct the damage done to the petitioner by Board member Smith's activities, merely by ordering the Board, after Smith's term had expired, to withdraw its original order. The change in the Board's membership also could not eradicate the harm. The testimony concerning Board member Smith was vital and essential before any Board or Court could lawfully determine whether petitioner had the full, fair and impartial hearing to which it was entitled.

(3) The unwarranted bias and partiality of the trial examiner at the first hearing.

(4) The unwarranted delays of the Board in the prosecution of this case from its inception on January 20, 1937, to the filing of the second decision on January 12, 1943.

The decision of the Board, as affirmed by the enforcement decree of the Court below, insofar as it concerns the cause of the strike of 1936, is not founded upon competent,

legal evidence, and is in conflict with applicable decisions of your Honorable Court. The record is devoid of substantial evidence showing that the strike of 1936 was caused by unfair labor practices and not solely from economic reasons, as contended by petitioner. *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, 229 (1938); *N. L. R. B. v. Columbian Enameling & Stamping Co.*, 306 U. S. 292, 299 (1939).

The Court below has decided an important question of federal law, namely, the right of the Board to include in its back-pay order the time lost through prolonged delays of the Board and of the striking union, which question has not been specifically decided and should be settled by your Honorable Court. Cf. *N. L. R. B. v. Electric Vacuum Cleaner Co., Inc.*, 315 U. S. 685 (1942).

The petitioner's rights as guaranteed by the Constitution of the United States should be preserved. It is entitled to a full, fair, prompt and impartial hearing, and to be subjected only to such orders as are based upon competent legal evidence, and in accordance with the provisions of the Act.

BERKSHIRE KNITTING MILLS,

By JOSEPH W. HENDERSON,
WELLINGTON M. BERTOLET,
of Counsel.

STATE OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

JOSEPH W. HENDERSON and WELLINGTON M. BERTOLET, being duly sworn according to law, depose and say that they are counsel for the petitioner herein and that the facts set forth in the foregoing petition are true and correct to the best of their knowledge, information and belief.

JOSEPH W. HENDERSON,
WELLINGTON M. BERTOLET.

Sworn to and subscribed before me this 20th day of April, A. D. 1944.

HARRISON G. KILDARE,
Notary Public.

(Seal)

My Commission expires January 25, 1947.

We hereby certify that we have examined the foregoing petition and that in our opinion it is well founded and entitled to the favorable consideration of the Court and that it is not filed for the purpose of delay.

JOSEPH W. HENDERSON,
WELLINGTON M. BERTOLET,
Counsel for Petitioner.

IN THE

Supreme Court of the United States.

No. . October Term, 1943.

BERKSHIRE KNITTING MILLS,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

For Opinions-below, Jurisdiction, Statement of the Case, and Questions Presented, see pages 1 to 9 of the Petition.

I. Petitioner Has Been Deprived of a Full, Fair, Prompt and Impartial Hearing.

Due process requires a full, prompt, fair and impartial hearing before an impartial tribunal. *Morgan v. United States*, 304 U. S. 1, 14 (1938); *Ohio Bell Telephone Company v. Public Utilities Commission*, 301 U. S. 292 (1937).

A "hearing", as authorized by the Act, means "a trial by a tribunal free from bias and prejudice and imbued with the desire to accord to the parties equal consideration". *Inland Steel Co. v. N. L. R. B.*, 109 F. (2d) 9, 20 (C. C. A. 7th, 1940). This constitutional guarantee of due process has been denied the petitioner in many ways and in many instances, and the wrong can only be corrected or remedied by your Honorable Court reviewing the case on writ of certiorari and thereafter setting aside the order of the Board in its entirety and directing a hearing *de novo*.

(a) The petitioner was not permitted to submit all its material evidence.

The petitioner has endeavored to present to the Board and to the lower Court for its consideration and for the future consideration of all other reviewing courts all facts having a bearing on the issues involved in the case, but petitioner, notwithstanding its constitutional rights, has been denied such an opportunity both by the Board and the Circuit Court of Appeals for the Third Circuit.

The Special Committee of the House of Representatives Investigating Labor Board and Wagner Act disclosed relevant and material evidence concerning the activities of Edwin S. Smith, who was then a member of the Board, and of certain other representatives, agents and attorneys of the Board, which bore upon the case including the cause of the strike of 1936 and which showed biased activities by a Board member and some of its staff in connection with the proceeding against petitioner, the details of which evidence are more fully set forth in pages 4 to 6 of the foregoing petition, and completely set forth in the petitioner's petition for leave to adduce additional testimony (I, 334-403).

When the petitioner first learned of this evidence, it forthwith filed its petition in the Court below for leave to adduce such additional evidence, but, notwithstanding the materiality and relevancy of the evidence so far as concerned the prejudice, partiality and delay on the part of the Board, and the cause of the strike of 1936, the petitioner has never been permitted to introduce this evidence into the record of this case.

While the petition to adduce additional evidence was first granted by the Court below in its opinion of June 19, 1941, and its order of July 21, 1941, thereon, so far as Smith's activities were concerned, the fact remains that the testimony concerning Board member Smith was never taken through no fault of petitioner or the Board (as neither one had been notified by the Clerk of the Court regarding

the Court's order of July 21, 1941, until about the first part of September 1941); thereafter the right to adduce this evidence was denied the petitioner when the Court below, the term of office of Smith having expired, entered a resettled order of October 14, 1941, in place of its order of July 21, 1941. Subsequently the Board denied a similar motion by petitioner prior to the resumed hearings, and the trial examiner at the resumed hearings also excluded such evidence * (X, 4347, 4457, 64).

The Court below on the second petition for review erroneously dismissed petitioner's contentions with the conclusion that they were without merit and had been disposed of in the previous opinion (XII, 4854); *Berkshire Knitting Mills v. N. L. R. B.*, 139 F. (2d) 134, 136 (C. C. A. 3rd, 1943).

We believe that the Board and the Court below erred to the prejudice of the petitioner in refusing petitioner the opportunity to present evidence which it deemed material and in failing to take the testimony concerning Smith's activities in this case. As stated by Mr. Chief Justice Stone in his dissenting opinion in *Pittsburgh Plate Glass Co. v. N. L. R. B.*, 313 U. S. 146, 177 (1941):

> "One of the most important safeguards of the rights of litigants and the minimal constitutional requirement, in proceedings before an administrative agency vested with discretion, is that it cannot rightly exclude from consideration facts and circumstances relevant to its inquiry which upon due consideration may be of persuasive weight in the exercise of its discretion."

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* Contrast the Board's refusal to receive in evidence those portions of the report of the Special Committee of the House of Representatives Investigating Labor Board and Wagner Act which are pertinent to the case at bar, with the action of the Board in receiving in evidence over petitioner's objection reports of congressional committees, being Board's Exhibits 61 (V, 2221), 62 (V, 2222), 64 (V, 2223) and 65 (V, 2220).

It was error for the Board and the Court below to have excluded this vital and material evidence which indisputably shows that the petitioner was prejudiced by the biased and prejudging activities of a Board member, namely Smith, and his subordinates, and that material evidence was knowingly suppressed which would have shown that the strike was caused solely by economic issues and not unfair labor practices.

Whether or not the Board would have reached a different conclusion on a hearing *de novo* is immaterial. Every litigant is entitled to a full, fair and impartial hearing, and a decision should not be made until all competent and material evidence offered by the litigants has been received and considered. *Donnelly Garment Co. v. N. L. R. B.*, 123 F. (2d) 215 (C. C. A. 8th, 1942).

Edwin S. Smith could not have been a fair and an impartial judge of the dispute that came before him in this case in view of his writings and actions as appears in the petition to adduce, and furthermore, petitioner could not be said to have had a fair, full and impartial hearing if your Honorable Court considers the other factors in the case which do not appear in the present record but are fully set forth in the petition to adduce, showing an interest and activity on the part of the designated parties to see that a case was made out against the petitioner.

The petitioner's petition to adduce after-discovered evidence sets forth the testimony taken before the Smith Committee with relation to the case at bar. On this testimony the Smith Committee, in its report to the House of Representatives (see Volume 4, pages 458, 459, 461 Verbatim Record of the Proceedings of House Committee Investigating Labor Board and Wagner Act, published in 1941 by The Bureau of National Affairs, Inc.), specifically found that Board member Smith aided in the promotion of a boycott against petitioner during the pendency of this cause before the Board; that his "conduct reveals an absence of that judicious and impartial temperament which the

American people demand from their quasi-judicial officers''; that the Board deliberately aided and abetted the promotion of industrial strife by refusing to proceed with the issuance of the complaint and the holding of a hearing because the union felt that ''there is a strong possibility of a general strike developing'', and that this attitude of the Board was utterly incompatible with the duties of the Board members as impartial, quasi-judicial officers.

The setting aside of the Board's decision and order dated November 3, 1939, and the reconsideration of the *original record* by the Board, in which a change of membership had occurred, did not remedy the harm done to petitioner. The procedure adopted in this case merely gave the Board an opportunity, after reviewing the case on an old record, to whitewash the biased activities of Board member Smith and some of the Board's subordinates and to bolster generally the findings which it had made in its first decision and to eliminate in a few instances certain findings which had been improperly included in the first order. The old record, tainted by the activities of Board member Smith and some of its subordinates, was still before it for consideration.

The petitioner from the inception of this case has never had a full, fair and impartial trial, and this denial of petitioner's constitutional right can only be cured by a hearing *de novo*.

Petitioner, like any litigant, is entitled to ''equal justice under the law'' and should be afforded an opportunity to adduce its material and relevant evidence.

(b) The petitioner was prejudiced by the conduct of the trial examiners.

The trial examiner at the first hearing did not conduct the case free from bias or with a desire to accord the litigants equal consideration. *Inland Steel Co. v. N. L. R. B., supra.*

Trial Examiner Kriz at the first hearings relaxed the rules of evidence when opposing counsel examined witnesses but applied them strictly against counsel for petitioner (VI, 2543, 4), even permitting the Board to clutter the record with irrelevant matters (V, 2035, 2050, 2058; VI, 2530). He admitted documents offered by the Board into evidence without looking at them (II, 683, 4; V, 2175) and further evidenced his bias by remarks and permitting strikers to applaud and hiss and boo during the hearings (V, 2066, 7; V, 2431; VII, 3459). Moreover, he permitted counsel for the striking union to cross-examine witnesses on matters not related to the union (IV, 1518, 9) while limiting counsel for the Intervenor to the extent that the proceedings pertained to the independent union. (II, 608.)

The rulings of Trial Examiner Riemer at the second hearings in 1942 were also prejudicial to the petitioner. His rulings on the petitioner's offer to introduce into evidence the relevant portions of the aforesaid congressional investigation deprived the petitioner of that fair and impartial hearing to which it was entitled. Likewise, he erred in not permitting counsel for petitioner to examine the minutes produced by witness Adams to determine what minutes related to the cause of the strike of 1936 or to examine the minutes himself. Contrast this action with what the Board did at the first hearing under its subpœna duces tecum on the independent union, when it took possession of all of the records of the independent union, examined them and placed in evidence every document on record which served the Board's purpose (I, 436). Notwithstanding the fact that this prior action was called to the attention of Trial Examiner Riemer, he still did not accord petitioner's counsel the similar privilege (X, 4173).

Prejudicial conduct on the part of trial examiners has frequently been the basis for setting aside an order of the Board and the granting of a new trial. *Inland Steel Co. v. N. L. R. B., supra; Montgomery Ward & Co. v. N. L. R. B.*, 103 F. (2d) 147 (C. C. A. 8th, 1939); *N. L. R. B.*

Washington Dehydrated Food Co., 118 F. (2d) 980 (C. C. A. 9th, 1941); *N. L. R. B. v. Phelps,* 136 F. (2d) 562 (C. C. A. 5th, 1943). See also *Donnelly Garment Co. v. N. L. R. B., supra,* where the case was remanded to the Board for further proceedings.

(c) Unwarranted delays of the Board deprived petitioner of a prompt hearing.

Due process of law not only requires a full, fair and impartial hearing, but also a prompt hearing. *N. L. R. B. v. National Casket Co.,* 107 F. (2d) 992 (C. C. A. 2nd, 1939). Long and unnecessary delays constitute an obvious hardship to an employer defending a charge of unfair labor practice.

An examination of the chronological history of the proceedings in this case as detailed in pages 2 to 7 of the foregoing petition will show that the Board inordinately delayed the prosecution of this case from its inception on January 20, 1937, to January 12, 1943. The petitioner only twice asked for continuances in the case, and both requests were refused (I, 27, 28, 209, 211).

As the Court below stated in its opinion: "This case bids fair for the unenviable distinction of being the Jarndyce v. Jarndyce of labor law." (XII, 4853.) A proceeding which has already extended over seven years because of inexcusable delays does not satisfy the constitutional requirement of a prompt hearing.

We further submit that the Court below erred in not deciding the petition to adduce at the time that it was presented instead of continuing the petition until argument of the case on the merits. If the Court below had determined the petition to adduce at that time in the same manner as it subsequently did in its opinion of June 19, 1941, the question of the propriety of the resettled order would never have arisen, for the testimony concerning the activities of Edwin S. Smith, we assume, would have been taken during that interval.

In conclusion, we submit that fair play is as binding, if not more binding, on administrative agencies as it is upon courts since many of the safeguards of court proceedings have been relaxed in the interests of supposed administrative efficiency.

Litigants are entitled to the "inexorable safeguard of a full, fair, prompt and impartial hearing" and if bias, prejudice and impartiality have been shown, they are entitled to a hearing *de novo*. "Once partiality appears . . . it taints and vitiates all the proceedings and no judgment based on them may stand": *N. L. R. B. v. Phelps, supra,* at 564.

II. The Finding of the Board That the Strike of 1936 Resulted From Unfair Labor Practices Is Unsupported by Substantial Evidence.

The Board failed to show affirmatively that the strike was caused by an unfair labor practice, but, on the contrary, the evidence shows that the strike was caused solely by economic controversies unrelated to any unfair labor practice.

All of the testimony presented at the hearings with regard to unfair labor practices related to isolated incidents during a period from 1933 to 1937. The Board adduced no testimony to show that the strike was called because of any of these incidents, which the Board has found to constitute unfair labor practices, or that the strike was prolonged by any of the incidents during the strike. On the contrary, the evidence shows that the strike was called solely for economic reasons relating to the possible economic betterment of the employees.

This conclusion is substantiated by a consideration of:

(1) The strike letters (PX 1, III, 1068-71; IX, 4022-5; PX 2, III, 1079-80; IX, 4025-6);

(2) The testimony of Board's witnesses Englehart, (III, 1068-72, 1079-80); Ammarell (IV, 1796-7); Adams

(X, 4329, 30, 64, 5); petitioner's employees (IV, 1604; V, 2085; IV, 1479; IV, 1628)*:

(3) Documentary evidence submitted in the case:

(a) Letter from the Federation to Hemmerich, dated September 14, 1936 (PX 1, IX, 4022);

(b) Letter from Branch 10 to Hemmerich, dated September 22, 1936 (PX 2, IX, 4025);

(c) Issue of "Picket Line News", dated October 13, 1936 (PX 7, IX, 4030);

(d) Circular letter dated December 10, 1936, issued by Federated Trades Council (BX, 19-5, VIII, 3943-6);

(e) Letter to Governor Earle from Payne, dated October 5, 1936 (BX 93, IX, 3994);

(f) Letter from Branch 10 to Werner, dated September 14, 1936 (INX 9, IX, 4117);

(g) Letter from Branch 10 to Werner, dated September 22, 1936 (INX 10, IX 4119);

(h) Minutes of Branch 10 Executive Board (PX_2 6, X, 4477-99);

(i) Minutes of Berkshire Division (PX_2 8, X 4500-23);

(j) Radio Address delivered by Rieve, President of American Federation of Hosiery Workers, on October 16, 1936 (after strike had begun) (PX 12, X 4552-59).

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* While the Board stated in footnote 37 of its decision (XI, 4754) that it has not relied on the testimony of Englehart, Ammarell, and Payne, who "testified in general terms that the strike was caused by the respondent's fostering of the Association, as well as by various alleged acts of discrimination against Federation members which had been reported to them but which are not shown by the record to have occurred", it has not specifically stated what testimony of these witnesses is not relied upon and what testimony, if any, the Board may have relied upon.

This testimony shows that the striking union certainly never considered that any unfair labor practice was the cause of the strike. Under these circumstances, the Board should not be permitted to make a finding of a fact which is unsupported by substantial evidence and which did not exist in the minds of the persons responsible for the strike. Findings must be based on substantial evidence.

III. The Board's Back Pay Order Should Not Include Time Lost Through Prolonged Delays of the Board and Branch 10.

Back pay orders may not be punitive or disciplinary but, as indicated in Section 10 (c) of the Act, should be entered solely for the purposes of effectuating the policies of the Act. Public interest, not the private rights of employees, is the determining factor.

Public interest requires that proceedings under the Act be disposed of with promptness and dispatch; yet in this case over seven years have elapsed since the strike of 1936 and the filing of charges with the Board in January of 1937.

In *N. L. R. B. v. Electric Vacuum Cleaner Co., Inc.*, 315 U. S. 685 (1942) your Honorable Court, in enforcing a back pay order notwithstanding employer's objection to the Board's delay, stated, at page 698:

> "There is nothing in the record, beyond a failure of the Board to file an intermediate report, which would tend to justify us, however, in shortening the period for compensation."

Your Honorable Court, we believe, has thus indicated that, if there had been facts in the record showing unconscionable delay on the part of the Board, then the back pay order would have been adjusted accordingly.

In this case the record is replete with facts which would justify such an adjustment as will appear from a review of

the chronological history appearing in paragraph thirty-three of petitioner's petition to review and set aside Board's order (XII, 4837, 8, 9).

See also *N. L. R. B. v. Crowe Coal Co.*, 104 F. (2d) 633 (C. C. A. 8th, 1939) where it was recognized that the present question might be raised in a subsequent case. There the Court said on page 641:

> "Undoubtedly cases may arise where time may be taken to enhance back pay recovery. Such cases must be met when presented."

An employer should not be penalized for the carelessness, inattention, or wilful delay of the Board and of the striking union beyond that by which is reasonably necessary to conclude a case.

The petitioner has not committed any unfair labor practice and should not be required to pay any back pay orders. However, if it is held that reinstatement is proper, the order should be modified so as to eliminate the periods of time lost through the delays of the Board and Branch 10, and no order should be prior at least to the date of the present final order of the Board of January 12, 1943.

Conclusion.

We, therefore, submit that the petitioner was not given a full, fair, prompt and impartial hearing; that the testimony if taken of Board member Edwin S. Smith would have disclosed a biased and partial judge and other prejudicial activities; that the strike of 1936 was not caused by any unfair labor practice by the petitioner; that even if reinstatement and back pay order is proper, the order should be modified so as to eliminate periods of time lost through delays of the Board and the striking union; that the United States Circuit Court of Appeals for the Third Circuit erred in affirming the order of the National Labor

Relations Board; and that the petitioner's prayer for writ of certiorari should be granted.

Respectfully submitted,

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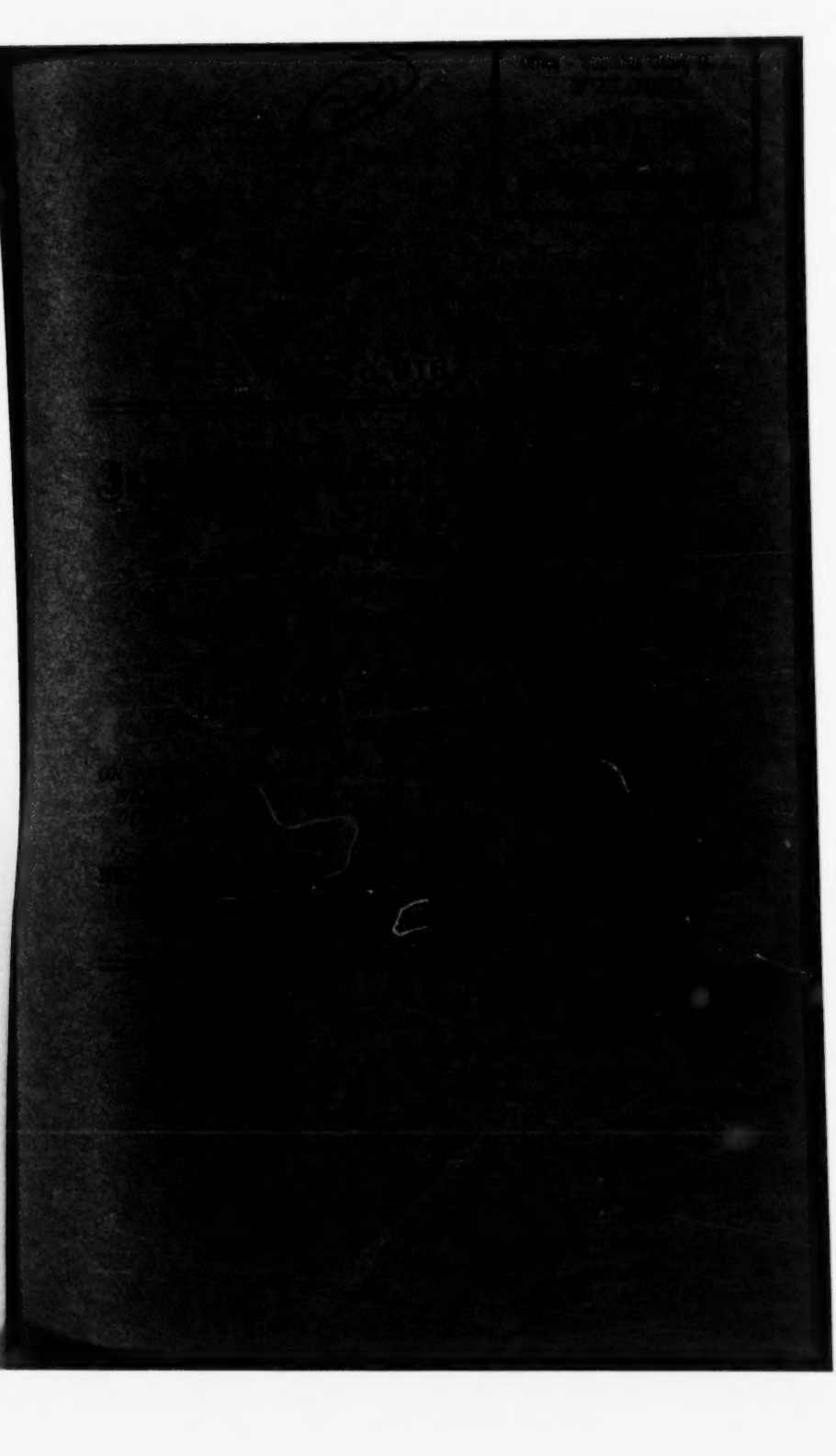
Philadelphia, Pennsylvania,
April 20, 1944.



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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 916

BERKSHIRE KNITTING MILLS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. XII, 4853–4865) is reported in 139 F. (2d) 134. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. XI, 4700–4787) are reported in 46 N. L. R. B. 955. The decision of the Board on its rule to show cause why its previous order in the case should not be set aside (R. X, 4129–4137) is reported in 37 N. L. R. B. 926. The decision of the court below

granting petitioner leave to adduce additional evidence (R. XII, 4803–4809) is reported in 121 F. (2d) 235. The earlier findings of fact, conclusions of law, and order of the Board (R. I, 218–303), subsequently vacated, are reported in 17 N. L. R. B. 239.

JURISDICTION

The decree of the court below (R. XII, 4866–4870) was entered on January 27, 1944. The petition for a writ of certiorari was filed on April 21, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether petitioner was accorded due process of law by the Board and the court below.

2. Whether there is substantial evidence to support the Board's finding that the strike which commenced at petitioner's plant on October 1, 1936, was caused by unfair labor practices committed by petitioner.

3. Whether the Board should have modified its normal back pay order in view of the length of time between the filing of charges by the complaining union and the issuance of the Board's final order.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., sec. 151, *et seq.*) are set forth in the Appendix, *infra,* pp. 24–26.

STATEMENT

I. The proceedings before the Board, the court below, and this Court

A complaint against petitioner having been issued by the Board on November 6, 1937 (R. I, 13–21), a hearing was held before Leo J. Kriz, a Trial Examiner of the Board, from November 29, 1937, to February 1, 1938 (R. I, 410 to VIII, 3741). After further proceedings, which are fully set forth in the Board's Decision and Order herein (R. XI, 4700–4705), the Board issued findings of fact, conclusions of law, and an order on November 3, 1939 (R. I, 218–303; 17 N. L. R. B. 239). On November 10, 1939, petitioner filed a petition for review of the Board's order in the court below (R. I. 305–322). Thereafter it filed with that court a petition for leave to adduce additional evidence in which it was alleged that Edwin S. Smith, then a member of the Board who participated in the Decision and Order of November 3, 1939, was disqualified by reason of bias, and that certain employees of the Board had acted in a manner prejudicial to petitioner (R. I. 334–402). On June 13, 1940, the court below granted a motion of the Board to continue the petition until

the hearing on the merits (R. XII, 4801–4802). Thereafter petitioner filed with this Court a motion for leave to file a petition for writ of mandamus directing the court below either to grant or deny the petition to adduce evidence prior to the hearing on the merits. This motion was denied on October 14, 1940. *Ex parte Berkshire Knitting Mills,* 311 U. S. 612.

On June 19, 1941, the court below, having heard argument on the petition to adduce further evidence and on the merits, granted the petition insofar as the activities and alleged bias of Board Member Smith were concerned (R. XII, 4803–4809). And on July 21, 1941, the court below formally remanded the case to the Board to receive evidence concerning the alleged bias of Mr. Smith and to determine whether he was disqualified from participating in the decision. It further ordered that if the Board should determine that Mr. Smith was disqualified, the case was to be reconsidered by other members of the Board who were not disqualified (R. XII, 4810). The term of office of Board Member Smith having expired on August 26, 1941, the court below, on motion of the Board, entered a resettled order on October 14, 1941, remanding the case to the Board and directing it to vacate its earlier decision, to hear oral argument, to reconsider the case, to make appropriate findings, and to enter an appropriate order (R. XII, 4813–4814).

On October 29, 1941, the Board vacated its earlier decision as well as all other actions in this proceeding in which Mr. Smith participated (R. XII, 4792–4793).[1] Having reconsidered an earlier application by petitioner for a subpena, the Board, on December 23, 1941, granted the application in part and directed the holding of a further hearing for the taking of certain evidence relating to the issue of the cause of a strike at petitioner's plant in 1936 (R. X, 4136). At the same time, the Board denied a motion by petitioner, theretofore filed, that it hear the evidence referred to in the petition to adduce additional evidence filed in the court below (R. X, 4130–4132; *supra,* p. 3). A hearing was held on January 12, 14, and 15, 1942, before Mortimer Riemer, a duly designated Trial Examiner (R. X, 4146–4465). At this hearing the Trial Examiner denied petitioner's motions to introduce some of the evidence previously rejected by the Board and the court below (R. X, 4338–4347, 4457–4465).

On January 12, 1943, the Board issued its findings of fact, conclusions of law, and the order now under review (R. XI, 4700–4787). Petitioner then filed its petition for review of this order (R. XII, 4821–4843), and the court below, on Decem-

[1] For a fuller description than is given here of the procedural steps between the remand of the case to the Board and the issuance of its decision and order of January 12, 1943, we respectfully refer the Court to that decision (R. XI, 4705–4710).

ber 1, 1943, held that the Board's order, with certain modifications not here material, should be enforced (R. XII, 4853–4865). The decree of the court below (R. XII, 4866–4870) was entered on January 27, 1944.

II. The findings, conclusions, and order of the Board

The findings of fact, conclusions of law, and order of the Board may be summarized as follows:[2]

(A) Interference, restraint, and coercion; domination and support of the Association

Petitioner is engaged at its plant in West Reading and Wyomissing, Pennsylvania, in the manufacture, sale, and distribution of women's full-fashioned hosiery. It is the largest producer of such hosiery in the country. In November 1937 it employed 5,773 employees (R. XI, 4710).

Immediately prior to a strike at petitioner's plant in 1933, called by American Federation of Hosiery Workers,[3] petitioner attempted unsuc-

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[2] Petitioner does not here challenge the substantiality of the evidence to support any of the findings of the Board except that concerning the strike of 1936. Since that finding rests primarily on the unfair labor practice findings, no reference is made in this statement to the supporting evidence.

[3] The Federation, which filed the charges herein, was then affiliated with the American Federation of Labor. At present it is affiliated with the Congress of Industrial Organizations. Branch 10 of the Federation admits full-fashioned hosiery workers employed in Berks County, Pennsylvania, to membership. Berkshire Division of Branch 10 is composed of employees of petitioner.

cessfully to establish an employees' representation plan among its employees (R. XI, 4711–4714). Following the strike, an election was held to select bargaining representatives of the employees. The Federation candidates won the election by a substantial majority, but petitioner refused to deal with the Federation as such and eventually entered into a contract with its representatives, as individuals, "for the employees they represent" (R. XI, 4714). As a result of petitioner's manifestations of preference for an unaffiliated organization and hostility to the Federation, Berkshire Employees Association, Inc., of Berkshire Knitting Mills was formed in the fall of 1933 (R. XI, 4715, 4730–4731).

The constitution of the Association was such as to render it susceptible to domination by petitioner (R. XI, 4715–4716, 4733). Both before and after the passage of the Act in 1935, petitioner assisted the Association by granting it the use of company time and premises for its activities (R. XI, 4716–4723, 4731–4732). The Association occupied part of one of petitioner's buildings as its regular office and meeting place, although like facilities were denied to the Federation (R. XI, 4716–4718, 4731–4732). Petitioner further gave the Association preferential treatment by dealing with it during the strike of 1936 while refusing to deal with the Federation (R. XI, 4734, 4748–4750). The activities of the Associa-

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tion with respect to working conditions and other matters showed that it failed to function as a free collective bargaining agent of the employees (R. XI, 4723–4730, 4733).

Following invalidation of the National Industrial Recovery Act in 1935, petitioner departed increasingly from the provisions of the N. R. A. Hosiery Code relating to working conditions. This so-called "break-down of standards" became a matter of general concern in the hosiery industry (R. XI, 4723–4724). While the Federation resisted petitioner's departures from code standards, the Association condoned and supported them and attempted to bring about their acceptance by the employees (R. XI, 4724–4727). In July 1936 the Federation decided to take vigorous steps to check the "break-down of standards" (R. XI, 4737). In the succeeding months, efforts to secure the cooperation of the Association in this endeavor were rebuffed (R. XI, 4738–4739). In September 1936 the Federation attempted to meet with petitioner to discuss the question of economic standards. At this point petitioner departed from its past practice and refused to meet with representatives of the Federation unless they were employees of the Company (R. XI, 4739–4740, 4750–4751). Its refusal, the Board found, was prompted by an intention to provoke a strike and to use the opportunity created by the strike to extirpate the Federation

as an influential force among its employees (R. XI, 4750–4753). On September 26, 1936, the Federation called a strike which commenced on October 1, 1936 (R. XI, 4740). During the strike petitioner, in furtherance of its aim to eliminate the Federation from its plant, refused to meet with the Federation and rejected all efforts at mediation by Federal and State authorities (R. XI, 4746–4747).

In addition, petitioner interfered with its employees' rights under the Act (R. XI, 4753) by, *inter alia,* forcing certain of its employees to sign a statement discrediting the Federation (R. XI, 4735–4737), engaging in surveillance of Federation meetings (R. XI, 4738, 4743–4744), and threatening to move its operations elsewhere (R. XI, 4744–4745). During the strike, petitioner paid the salaries of a large number of deputy sheriffs, some of whom engaged in acts of provocation against the strikers (R. XI, 4741–4742).

The Board found that, by the acts described above, petitioner engaged in unfair labor practices within the meaning of Section 8 (1) and (2) of the Act (R. XI, 4734, 4753, 4778–4779).

(B) The cause of the strike

The strike which started on October 1, 1936, was caused and prolonged by unfair labor practices on the part of petitioner (R. XI, 4759). The Federation's aim in calling the strike was unquestionably to halt the "break-down of standards" and to restore the economic conditions

existing under the N. R. A. Code, and the demands served upon petitioner by the Federation prior to and during the strike were of an economic character (R. XI, 4754). However, had it not been for the unfair labor practices committed by petitioner, the Federation could have pursued its aims by attempting to secure the support of the employees and by establishing bargaining relationships with petitioner, rather than by strike action. From 1933 to 1936 the Federation resorted to the first of these alternatives exclusively. Its endeavors were thwarted by petitioner's unfair labor practices and particularly by the latter's domination and support of the Association, which played an important role in preventing the employees from affiliating with the Federation and in procuring acceptance by the employees of petitioner's departures from economic standards (R. XI, 4754–4756). Moreover, at the very time the Federation was considering resort to its strike weapon, petitioner engaged in unfair labor practices which were aimed at precipitating the strike (R. XI, 4756). Thus, while the "break-down of standards" provided the motive for collective activity by the Federation and petitioner's employees in 1936, the form which that activity took in October, industrial warfare, was determined by petitioner's unfair labor practices. Hence, the Board concluded, those practices were a fundamental cause

of the strike (R. XI, 4756–4759). Once begun, the strike was prolonged by further unfair labor practices on the part of petitioner, including its rejection of all settlement efforts and its policy of discrimination against active strikers (R. XI, 4756).

(C) Discrimination with respect to employment

When striking employees applied for reinstatement during the strike, petitioner adopted a policy of rejecting active strikers, effected in part by requiring strikers to be interviewed by a committee of employees concerning their activities in, and attitude towards, the strike and the Federation (R. XI, 4759–4763). Eighteen named strikers were discriminatorily refused reinstatement because of their strike activities or because their jobs had been taken by strikebreakers (R. XI, 4763–4765).[4] One employee was discharged immediately prior to the commencement of the strike and two were discharged during the strike because they gave support to other employees engaged in union activities (R. XI, 4765–4767). By these acts, the Board found, petitioner committed unfair labor practices within the meaning of Section 8 (3) and (1) of the Act (R. XI, 4765, 4767, 4778–4779).

[4] The Board dismissed allegations in the complaint of discriminatory refusals to reinstate 282 other named employees (R. XI, 4759, 4783).

(D) The Board's order

The Board ordered petitioner to cease and desist from its unfair labor practices (R. XI, 4779–4780, par. 1 (a), (c), and (d)); to withdraw recognition from and completely disestablish the Association as representative of any of its employees for collective bargaining purposes and to cease and desist from giving effect to any contract with the Association (R. XI, 4779–4780, par. 1 (b) and 2 (a); see also R. XI, 4768–4769); and to reinstate the employees discriminated against, with back pay (R. XI, 4780–4781, par. 2 (b), (c), and (d); see also R. XI, 4773). Since the strike was caused and prolonged by petitioner's unfair labor practices, the Board further ordered petitioner to reinstate any strikers who had applied for and had been refused reinstatement and to offer reinstatement upon application to strikers who had not applied for reinstatement, with appropriate provisions for back pay (R. XI, 4780–4782, par. 2 (b), (e), and (f); see also R. XI, 4774–4775).[5]

ARGUMENT

I. The alleged denial of due process

1. It is well settled that, in the absence of prejudice, irregularities in the proceedings afford

[5] The Board excepted from the provisions of the order six persons who had been convicted of unlawful conduct during the strike (R. XI, 4769–4773, 4780–4782, par. 2 (b), (e), and (f)).

no ground for setting aside an order of the Board.[6] Petitioner does not indicate the manner and extent to which it claims to have been prejudiced by the various errors allegedly made by the Board and the court below. Moreover, as we shall undertake to show, petitioner's allegations of error are without foundation in the record.

2. Petitioner contends that the Board should have heard and considered, or should have been required by the court below to hear and consider, evidence concerning Board Member Smith's alleged bias. No showing is made, however, that Mr. Smith's prior participation in this case affected in any way the record on which the present decision and order of the Board are based (Pet. 3–4, 9–10, 16–17). He took no part in the compilation of testimony and other evidence before the Trial Examiner at the first hearing. The record made at that hearing, therefore, could properly be considered by the reconstituted Board. Mr. Smith ceased to be a member of the Board on August 26, 1941 (R. XII, 4811–4812); and the Board's decision was issued on January 12, 1943

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[6] *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 350–351; *National Labor Relations Board* v. *Air Associates, Inc.*, 121 F. (2d) 586, 589 (C. C. A. 2); *National Labor Relations Board* v. *Stackpole Carbon Co.*, 105 F. (2d) 167, 177 (C. C. A. 3), certiorari denied, 308 U. S. 605; *National Labor Relations Board* v. *Ed. Friedrich, Inc.*, 116 F. (2d) 888, 889 (C. C. A. 5); *National Labor Relations Board* v. *Ford Motor Co.*, 114 F. (2d) 905, 909 (C. C. A. 6), certiorari denied, 312 U. S. 689; *Wilson & Co.*, v. *National Labor Relations Board*, 103 F. (2d) 243, 245 (C. C. A. 8).

(R. XI, 4700–4789). In these circumstances, as the court below held (R. XII, 4854), there was no reason "why attention should have been deflected from this proceeding to examine the alleged bias of the former member." (See also the Board's Decision on Order to Show Cause, R. X, 4131–4132.)

3. The evidence other than that pertaining to Mr. Smith, described in the petition to adduce evidence (*supra,* p. 3), which petitioner has repeatedly sought to include in the record in this case (Pet. 3–5, 6–7, 9, 14, 16–17, 18), has twice been considered and rejected by the court below (R. XII, 4795–4797, 4854).[7] These rulings, we submit, were clearly correct. The fact that a review attorney may have had access to memoranda and files of the Board which were not part of the record in the case (R. I. 400–401; Pet. 4) is no basis for assuming that such memoranda and files improperly influenced the Board's decision. As the court below noted, the review attorney "is not the responsible fact finder; the Board is" (R. XII, 4795–4796). The broad allegation that "material evidence was knowingly suppressed [by the Board] which would have shown that the strike was caused solely by economic issues and not

[7] None of the evidence proffered in the petition to adduce sustains petitioner's assertion that Mr. Smith and his subordinates "made special efforts to see 'that a case was made out' against the petitioner" (Pet. 4).

unfair labor practices" (Pet. 16; see also pp. 4, 6, 14) refers to memoranda in the Board's files which disclose that agents of the Board and officials of the Federation expressed the opinion, before the Board's investigation was made, that the cause of the strike was of an economic character and that it was doubtful whether charges of unfair labor practices could be sustained (R. I, 386–389). Petitioner's contention that the Board should have introduced these memoranda in evidence is manifestly without substance. These documents contained mere expressions of opinion upon matters which could be decided only by the Board itself.[8] Moreover, as the court below observed (R. XII, 4797):

> it would be utterly impracticable and undesirable to open up all the records and files of a public officer, a board, or a court to examine all the documents or other communications which had passed between either members or employees of one of them prior to the conclusion upon any particular subject.

For reasons of space we refrain from discussing the remainder of the evidence offered in the peti-

[8] Indeed, not even a prior administrative decision by the Board itself can prevent the Board from subsequently reconsidering the matter and reaching a contrary result. *National Labor Relations Board* v. *Baltimore Transit Co.*, 140 F. (2d) 51, 54–55 (C. C. A. 4), certiorari denied, No. 735, this Term.

tion to adduce, and respectfully refer the Court to the able disposition of this matter made by the court below (R. XII, 4795–4797).

4. Petitioner bases its contention of misconduct by the Trial Examiner at the first hearing on some 12 references to a printed record of 3,332 pages (Pet. 2, 10, 18). Examination of the portions of the record referred to will reveal no improper conduct on the part of the examiner. Even if it were shown that some of his rulings were doubtful, petitioner's sweeping allegation of bias would still be unsupported. *Berger* v. *United States,* 255 U. S. 22, 31. Moreover, petitioner makes no attempt to show that it was prejudiced by any of the rulings in question. See cases cited *supra,* p. 13, n. 6.

Illustrative of the insubstantial nature of petitioner's allegations is its complaint that the Trial Examiner admitted documents into evidence without looking at them (Pet. 2, 18). The documents had already been described, and the objections to their admission were based not on the accuracy of the description but on the relevance of the documents as described (R. II, 683–687; V, 2173–2175). Under these circumstances examination of the documents obviously would have served no useful purpose.

The court below, upon examination of the record, concluded (R. XII, 4857):

without indicating an agreement with the trial examiner in all the rulings, we think his attitude was fair and impartial to both sides under conditions which it is understatement to describe as difficult.

5. Petitioner's objections to the rulings of the Trial Examiner at the second hearing, insofar as they are based on his exclusion of evidence contained in the petition to adduce (Pet. 6–7, 18), have already been dealt with (*supra,* pp. 13–16). The Trial Examiner's allegedly erroneous rulings with respect to examination of the minutes of the Federation (Pet. 7, 18) were entirely proper. The subpenas under which the minutes were produced were drawn in precisely the words used in petitioner's application therefor; that is, they called for "such portions of the minutes * * * as are relevant to the allegation in the Board's complaint that said strike [of 1936] was caused by unfair labor practices on the part of [petitioner]" (R. X, 4140–4144). The Trial Examiner accordingly required production only of the relevant minutes (R. X, 4171–4178). Petitioner is in no position to complain against the Board's compliance with its own request. An order directing the production of all of the Federation's minutes would have constituted a wholly unwarranted "fishing expedition" into the Federation's internal affairs. Moreover, petitioner was in no respect prejudiced by the rulings. As we shall

show later (*infra*, pp. 20–21), the Board, in deciding the question of the cause of the strike, took into consideration the fact that the declared aim of the strike was economic. The only purpose which the minutes could have served was to prove that undisputed fact.

Petitioner's objection to the Trial Examiner's admission of copies of original minutes (Pet. 7) is likewise without merit. The absence of the originals was accounted for (R. X, 4211, 4391–4392, 4443), the copies were "the kind of evidence on which responsible persons are accustomed to rely in serious affairs" (*National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 873 (C. C. A. 2), certiorari denied, 304 U. S. 576, 585), and petitioner has not shown that it was prejudiced by these rulings.

6. Petitioner contends that it has been denied due process of law because of the allegedly inordinate length of time it has taken to dispose of this case (Pet. 10, 19). As the court below pointed out, petitioner "makes no charge that the delay was intentional or designed to prejudice its position" (R. XII, 4854). It noted, also, that "the case has been vigorously contested at every stage of the proceedings by [petitioner]" (R. XII, 4853–4854). We submit, therefore, that the court below was right in holding that the delay, while

greatly to be regretted, cannot be characterized as a denial to petitioner of due process of law. (*Ibid.*)

7. Petitioner further contends (Pet. 19) that the court below erred in postponing disposition of the petition to adduce until the original hearing on the merits (*supra,* pp. 3–4). Petitioner makes no effort to show that this action of the court was an abuse of its sound discretion. *Ex parte Bradstreet,* 8 Pet. 588, 590. As the court noted (R. XII, 4795):

> After-events proved that the procedure was a wise one because the problems presented in the petition to adduce fall into perspective when viewed in the light of the main case.

The only prejudice which petitioner claims as a result of this action is that, if it had not been taken, the evidence concerning the alleged bias of Board Member Smith would have been received (Pet. 19). As we have shown, petitioner was in no way prejudiced by the failure to hear that evidence.

8. The court below gave careful attention to each of petitioner's claims in support of its contention that it was denied a fair hearing (R. XII, 4853–4857). We submit that its decision was correct and raises no question of importance requiring review by this Court.

II. The cause of the strike

9. The factual basis upon which the Board concluded that the strike was caused and prolonged by unfair labor practices on the part of petitioner is set forth above (*supra,* pp. 6–11). The decision of the court below in sustaining this finding as supported by the evidence is in accord with its prior decisions as well as those of other circuit courts of appeals.[9] There are no contrary decisions.

In challenging this finding (Pet. 20–22) petitioner relies almost exclusively on evidence tending to show that the strike was called for economic reasons. The Board gave full consideration to this evidence (*supra,* pp. 9–10; R. XI, 4754). It examined the factors which determined the employees' choice of collective action in order to achieve their ends, and concluded (R. XI, 4757) that the employees' resort to a strike was the

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[9] *Republic Steel Corp.* v. *National Labor Relations Board,* 107 F. (2d) 472, 478 (C. C. A. 3), modified on another point, 311 U. S. 7; *National Labor Relations Board* v. *Elkland Leather Company, Inc.,* 114 F. (2d) 221, 225 (C. C. A. 3), certiorari denied, 311 U. S. 705; *Great Southern Trucking Co.* v. *National Labor Relations Board,* 127 F. (2d) 180, 186 (C. C. A. 4), certiorari denied, 317 U. S. 652; *National Labor Relations Board* v. *Barrett Co.,* 135 F. (2d) 959 (C. C. A. 7); *National Labor Relations Board* v. *Remington Rand, Inc.,* 94 F. (2d) 862, 872 (C. C. A. 2), certiorari denied, 304 U. S. 576, 585.

consequence of petitioner's illegal conduct. The Board found that the course of conduct pursued by the petitioner resulted in the evil which Congress recognized in Section 1 of the Act:

> The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, * * *.[10]

Nothing in the petition or the record offers any basis for rejecting the Board's conclusion.

Petitioner's further contention that the record discloses no more than "isolated incidents" of illegal conduct prior to the strike (Pet. 2, 20) is refuted by the Board's finding, supported by the evidence, of petitioner's long-continued and pervasive policy of preventing unionization of its employees (*supra,* pp. 6–9).

III. The back pay order

10. Petitioner contends that the period for which it is required to pay back pay to the employees injured by its unfair labor practices should be reduced because of alleged delays on the part of the Board and the Federation (Pet. 11, 22–23). As has been noted, the Board was not guilty of unwarranted delays, and petitioner makes no at-

[10] See also *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 42.

tempt to show that any delays were attributable to the Federation.[11]

Petitioner correctly notes that the Board's order must be remedial rather than punitive (Pet. 22). *Republic Steel Corp.* v. *National Labor Relations Board,* 311 U. S. 7. The Board's order here is remedial; petitioner makes no effort to show that it is punitive. Only an award of full back pay can undo the effects of petitioner's unfair labor practices. Clearly, as between petitioner, which caused the loss of wages, and the victims of its unlawful conduct, the loss should be borne by the former. Such was the holding of this court in *National Labor Relations Board* v. *Electric Vacuum Cleaner Co.,* 315 U. S. 685, 698.[12] A petition for certiorari based on identical

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[11] Petitioner's reliance on *National Labor Relations Board* v. *Crowe Coal Company*, 104 F. (2d) 633, 640–641 (C. C. A. 8), certiorari denied, 308 U. S. 584 (Pet. 23), is misplaced. That case dealt with delays on the part of complaining labor organizations or employees. See also *National Labor Relations Board* v. *William Davies Co.*, 135 F. (2d) 179, 183–184 (C. C. A. 7), certiorari denied, 320 U. S. 770.

[12] Cf. *Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572, 583; *National Labor Relations Board* v. *J. G. Boswell Co.*, 136 F. (2d) 585, 597 (C. C. A. 9); *National Labor Relations Board* v. *Wm. Davies Co.*, 135 F. (2d) 179, 183–184 (C. C. A. 7), certiorari denied, 320 U. S. 770; *Firth Carpet Co.* v. *National Labor Relations Board*, 129 F. (2d) 633, 636 (C. C. A. 2); *National Labor Relations Board* v. *Bachelder*, 120 F. (2d) 574, 579 (C. C. A. 7), certiorari denied, 314 U. S. 647; *Eagle-Picher Mining & Smelting Co.* v. *National Labor Relations Board*, 119 F. (2d) 903, 915 (C. C. A. 8); *Triplex Screw Co.* v. *National Labor Relations*

grounds was recently denied by this Court in *National Labor Relations Board* v. *American Creosoting Co., Inc.*, 139 F. (2d) 193, 196 (C. C. A. 6), certiorari denied, No. 756, this Term.

CONCLUSION

The decision below is correct, and no questions warranting review are presented. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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MAY 1944.

Board, 117 F. (2d) 858, 862 (C. C. A. 6); *Phelps Dodge Corp.* v. *National Labor Relations Board*, 113 F. (2d) 202, 206 (C. C. A. 2), affirmed 313 U. S. 177, 200.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C., sec. 151 *et seq.*) are as follows:

> SEC. 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, * * *.
>
> * * * * * *
>
> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> (2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *.
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *.
>
> * * * * * *

SEC. 10. (b) * * * In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.

* * * * *

(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. * * *

(f) * * * Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like

manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

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